Supreme Court, U.S.
FILED

971695 APR 14 1998

OFFICE OF THE CLERK

No. _____

In The Supreme Court of the United States

October Term, 1997

IN RE ASBESTOS LITIGATION:

JAMES FLANAGAN AND DAVID H. MIDDLETON,
Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS MCGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION; DANIEL HERMAN RUDD, JR., ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; JOHN HANSEL, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

VOLUME I, Pages A-1–A-66

LEONARD C. JAQUES
Counsel of Record
THE JAQUES ADMIRALTY LAW FIRM, P.C.
1370 Penobscot Building
Detroit, Michigan 48226
(313) 961-1080
Counsel for Petitioners Flanagan and Middleton

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

68 pp

TABLE OF CONTENTS OF APPENDIX

PAGE

Volume I

OPINION – United States Court of Appeals for the Fifth Circuit (*January 27, 1998*) A-1

Dissenting Opinion A-3

TRANSCRIPT OF ORAL ARGUMENTS – United States Court of Appeals for the Fifth Circuit (*November 12, 1997*) A-33

ORDER GRANTING CERTIORARI, VACATING JUDGMENT, AND REMANDING CASE TO U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT – United States Supreme Court (*June 27, 1997*) A-65

Volume II

ORDER DENYING REHEARING EN BANC – United States Court of Appeals for the Fifth Circuit (*November 26, 1996*) A-67

OPINION – United States Court of Appeals for the Fifth Circuit (*July 26, 1996*) A-70

Dissenting Opinion A-125

MEMORANDUM OPINION – United States District Court, Eastern District of Texas, Tyler Division (*July 27, 1995*) A-201

OPINION ON SUGGESTION FOR PANEL REHEARING – United States Court of Appeals for the Fifth Circuit (*December 3, 1996*) A-253

TRANSCRIPT OF PROCEEDINGS – United States District Court, Eastern District of Texas, Tyler Division (*August 27, 1993*) A-258

PAGE

TRANSCRIPT OF PROCEEDINGS – United States District Court, Eastern District of Texas, Tyler Division (*September 9, 1993*) A-279

28 U.S.C. § 455 ..... A-287

FEDERAL RULES OF CIVIL PROCEDURE 23 ..... A-290

APPENDIX TO PETITION FOR CERTIORARI

- VOLUME I -

• • •

OPINION

(CITE AS: 134 F.3d 668)

(United States Court of Appeals — Fifth Circuit)

(Dated January 27, 1998)

(IN RE ASBESTOS LITIGATION, James FLANAGAN, David H. Middleton, Edee Cochran, Esteban Yanez Ortiz, John R. Allgood, Henry William Evers, Lester Eugene Taylor and Safety National Casualty Corporation, Appellants, v. Gerald AHEARN, James McAdams Dennis, Charles W. Jeep, James Drake, Juanita Drake, James Ellison, Roland Dearborn, Judith Dearborn, Kerwin Butcher, Dir., Workers Comp., Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor, Paul Cochran, Ida Beck, Marion Behee, Longshore Intervenor, William James Mitchell, Fibreboard Corporation, Bethlehem Steel Corporation, Continental Casualty Company, Pacific Indemnity, Francis McGovern, Owens-Illinois, Inc., Penn Mutual Life Insurance Company, Columbia Casualty Company, CNA Casualty Company of California, Celotex Corp., Daniel Herman Rudd Jr., on behalf of themselves and others similarly situated, John Hansel, on behalf of themselves and others similarly situated, Appellees — No. 95-40635; Appeals from the United States District Court for the Eastern District of Texas)

Before: REAVLEY, DAVIS and SMITH, Circuit Judges.

PER CURIAM

In our prior opinion, we affirmed the judgment below, which approved class action settlements of asbestos-related claims involving Fibreboard Corporation. *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), vacated, ___ U.S. ___, 117 S.Ct. 2503, 138 L.Ed.2d 1008 (1997). The Supreme Court vacated our judgment and remanded the

case for reconsideration in light of *Amchem Products, Inc.* v. *Windsor*, ___ U.S. ___, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). After oral argument and reconsideration, we can find nothing in the *Amchem* opinion that changes our prior decision. We again affirm.

There are two controlling differences between this case and *Amchem*. First, this class action proceeded under Rule 23(b)(1); *Amchem* was a Rule 23(b)(3) case. Second, there was no allocation or difference in award, according to nature or severity of injury, in the present case as there was in *Amchem*; in the case here all members of the future claimant class are treated alike. Individual damage awards will subsequently be decided according to individual damages.

The district court made extensive findings and found, specifically, that separate actions by members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. The language of the district court matches the language of Rule 23(b)(1)(B). No one has contested that finding of the district court, probably because it is incontestable.

The Supreme Court stated in *Amchem* that a settlement class action, like all federal class actions, cannot proceed unless the requirements of Rule 23(a) are met, irrespective of whether the proposed settlement is deemed fair under Rule 23(e). We detailed in our prior opinion our agreement with the thorough study and conclusions by the district court, satisfying the requirements of class certification under Rule 23(a). All members of the class, and all class representatives, share the common interests: suffering harm from asbestos exposure and seeking equitable distribution of compensation from limited funds. None of the uncommon questions, abounding in *Amchem*, exist in the present case.

The only conflict between members of the future claimant class could be competition for larger and earlier shares of available money, but that is precisely the reason for Rule 23(b)(1)(B) and the problem it is designed to solve where the money is limited. That conflict or competition is controlled for the benefit of all members of the class. It follows that the lawyer representing the class serves only common interests of the class.

The judgment of the district court is AFFIRMED.

JERRY E. SMITH, Circuit Judge, dissenting:

In a five-paragraph unsigned opinion, the panel majority states that "we can find nothing in the *Amchem* opinion that changes our prior decision."[1] Like that prior decision, the new majority opinion overrides the substantive and procedural rights of large groups of asbestos claimants. Because this court cannot properly bless a settlement that Congress has not authorized and the Constitution forbids, I respectfully dissent.

I.

Even if, arguendo, the law that informs this case was not plain before the Court decided *Amchem Prods.* v. *Windsor*, ___ U.S. ___, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), that law is evident now. It is not surprising that the Court issued a "GVR"[2] requiring this court to recon-

---

1 In published form, the majority opinion will consume only about a page. Accordingly, I will not burden the reader with page references.

2 The acronym "GVR" refers to the Supreme Court's practice of granting certiorari, vacating, and remanding for further consideration in light of some intervening development. The practice is thoroughly explained in *Lawrence* v. *Chater*, 516 U.S. 163, 165-75, 116 S.Ct. at 604, 605-10, 133 L.Ed.2d 545 (1996) (*per curiam*). See *Carter* v. *Johnson*, 131 F.3d 452, 457 n.2 (5th Cir. 1997).

sider the majority's now-vacated opinion[3] in light of *Amchem*. The Court issues a GVR order "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration . . . ." *Lawrence*, 516 U.S. at 167, 116 S.Ct. at 607. I believe the remand in this immensely important case merits more thorough consideration than is reflected in the majority's terse *per curiam* treatment.

II.

Like the district court *a quo*, the district court in *Amchem* had approved a gigantic settlement, including a complex scheme for processing claims administratively, in an effort to achieve efficiency and fairness in the resolution of massive numbers of asbestos claims without resort to individual trials.[4] The *Amchem* Court rejected the settlement because it plainly is not authorized by the applicable rules and statutes:

> The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And [Fed. R. Civ. P.] 23, which must be interpreted with fidelity to the Rules Enabling Act [, 28 U.S.C. § 2072(b),] and applied with the interests of absent class members in close view, cannot carry the large load . . . the

---

3 See *Flanagan* v. *Ahearn (In re Asbestos Litig.)*, 90 F.3d 963 (5th Cir. 1996) ("*Ahearn I*"), vacated, ___ U.S. ___, 117 S.Ct. 2503, 138 L.Ed.2d 1008 (1997).

4 For a recitation of the facts and proceedings, the reader is referred to the prior panel majority and dissenting opinions in this case. See *Ahearn I*, 90 F.3d at 968-74; *id.* at 993-98 (Smith, J., dissenting).

> District Court heaped upon it. As this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste."

___ U.S. at ___, 117 S.Ct. at 2252 (footnote and citation omitted, last three brackets in original).

The lesson is that, regardless of the benefits a particular settlement might seem to confer, in terms of "the greatest good for the greatest number" of parties, the niceties of statutory and constitutional constraints must be observed. Thus, while parties and district courts can be praised for their resourcefulness in formulating settlements that resolve mass tort litigation, the statutory and constitutional constraints, as the *Amchem* Court observed, "serve to inhibit appraisals of the chancellor's foot kind — class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248.

This general theme, expressed forcefully in *Amchem*, is reinforced by the Court's discussion of specific issues, most of which are highly relevant to the instant case. While *Amchem* focuses on the issues of predominance and adequacy of representation, the Court emphasizes that these are not the only considerations a court must address when certifying a settlement class.[5]

III.

Before discussing the issues dealt with directly in *Amchem*, I note that this is not, as the majority

---

[5] See, e.g., *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2252 ("Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here . . . . [H]owever . . . we recognize the gravity of the question . . . .").

would have it, a "limited fund" case. I will show, below, that the majority's analysis is fatally flawed even if we treat this matter as involving a limited fund — a question not present in *Amchem* — but I adhere to my previously-stated view that Fibreboard and its insurers do not collectively constitute a "limited fund" that would allow class certification under Fed. R. Civ. P. 23(b)(1)(B). See *Ahearn I*, 90 F.3d at 1002 n.17 (Smith, J., dissenting).

This issue alone should be dispositive of the matter, for if this class cannot go forward as a "limited fund" class, it would require certification under rule 23(b)(3) and would then be subject to the requirements of predominance and superiority. *Amchem* would specifically prevent class certification, for here, we have precisely the same disparities that destroyed cohesion in the *Amchem* class:

> "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma. . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> "The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories."

Amchem, ___ U.S. at ___, 117 S.Ct. at 2250 (quoting *Georgine* v. *Amchem Prods.*, 83 F.3d 610, 626 (3d Cir.

1996)). In *Amchem*, as here, differences in state law compound these disparities. *Id.*

The panel majority concludes that the district court's finding that Fibreboard is a "limited fund" is "incontestable".[6] This is error, for rule 23(b)(1)(B) cannot reasonably be read to allow a "limited fund" class where, as here, there is and was no "fund" except that which was established by the settlement itself.[7] Congress long ago established a comprehensive bankruptcy scheme to govern situations in which a company is unable to pay its debts. Here, the district court speculated that, at some point in the future, Fibreboard may be unable to pay all of its asbestos tort creditors. The court then, in effect, discharged the debt owed that particular class of creditors while avoiding the procedural protections of the bankruptcy code. This is manifestly incorrect.

Courts have been confronted with at least two different theories under which rule 23(b)(1)(B) would apply to cases that do not fit into this "limited fund" paradigm: the "constructive bankruptcy" and the "punitive damage overkill" theories. See Arthur R. Miller and David Crump, *Jurisdiction and Choice of Law in Multistage Class Actions after* Phillips Petroleum Co. *v.* Shutts, 96 YALE L.J. 1, 42 (1986). The instant putative class

---

6 The panel majority's statement that "[n]o one has contested that finding of the district court" is simply inaccurate: Briefs in the original appeal and on remand vigorously contest the "limited fund" characterization.

7 Rule 23(b)(1)(B) does not mention a "limited fund" but, instead, allows class certification where individual adjudications "would as a practical matter . . . substantially impair" the ability of class members to protect their interests. Thus, the class members' interests might be in mineral reserves, water rights, or a fixed amount of money. The rule necessarily contemplates the allocation of a limited resource, however, for only where the class members' interests are to some degree mutually exclusive will the individuals' litigation "substantially impair" the others' rights. Thus, where the remedy sought is money damages, the paradigm is of a "limited fund" to be distributed for the class members' benefit.

seeks certification on the basis of "constructive bankruptcy." That is, the claimants theorize that if Fibreboard continues to pay asbestos settlements and judgments, it will eventually go bankrupt, and this, as a practical matter, will dispose of later-brought claims.

A.

The panel majority gives great deference to the district court's factual finding that the maintenance of individual actions by class members might be dispositive of the interests of other parties. The majority accurately notes that "the language of the district court matches the language of Rule 23(b)(1)(B)," but the enunciation of these magic words cannot insulate the underlying legal determination from review, any more than would a trial court's factual finding that a defendant is liable. As a matter of law, this "finding," which is overtly conclusory, is incorrect.

The class proponents cite cases in which appellate courts have upheld "limited fund" class certifications under rule 23(b)(1)(B), but these cases invariably involve a "fund" that, unlike an ongoing concern, is necessarily limited.[8] These applications of rule 23(b)(1)(B) are appropriate, for the rule obviously applies where "claims are made by numerous persons against a fund

---

8 For example, in *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992), *modified on reh'g sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993), the underlying trust fund had been established during the asbestos defendant's bankruptcy reorganization. It was entirely proper, then, for the claims against that fund to be litigated en masse as a "limited fund" class. In *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), the defendant had established a $350 million fund in settlement of an SEC enforcement action, and subsequently went bankrupt. This, also, involved an actual "fund" that was "limited". And in *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 35 S.Ct. 692, 59 L.Ed. 1165 (1915), there was a true "fund" against which the individual causes of action arose: a mortuary fund held by Hartford for the benefit of thousands of members.

insufficient to satisfy all claims."[9] Professor Newberg states:

> A limited fund exists when a fixed asset or piece of property exists in which all class members have a preexisting interest . . . . Classic illustrations include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime suit, and others.

1 NEWBERG ON CLASS ACTIONS §4.09, at 4-33 (emphasis added). Here, there is neither a fixed asset nor property in which the putative class members have an interest. Their claims are made not against a "fund", but against Fibreboard itself.

It is fundamental that an injured party has an *in personam* claim against the person responsible for his injury.[10] Such a claim is not limited by the amount of insurance carried by a defendant, nor by its liquid assets or net worth. A final judgment against the defendant becomes much like any other debt, able to be collected from any of a defaulting debtor's existing or after-acquired assets.[11]

---

9 Rules Advisory Committee, *Notes to 1966 Amendments to Rule 23*, 39 F.R.D. 69, 101; see also 1 NEWBERG ON CLASS ACTIONS § 4.09, at 4-31 (noting that "the most common use of subsection (b)(1)(B) class actions is in limited fund cases")

10 Take, as a random example, the admiralty case of *Grubart* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995), in which the contested issue was whether the Limitation on Vessel Owners' Liability Act, 46 U.S.C. § 181 *et seq.*, should apply. If it did, all the victims of the Chicago flood would be limited in their recovery to the value of a few marine vessels; but if it did not, the victims of the flood could recover *in personam* against the defendant and its insurers. See Grubart, 513 U.S. at 531, 115 S.Ct. at 1047.

11 Also, as I note below in part III.B, Fibreboard has been purchased by Owens-Corning, whose assets could be available, in

(*concluded on page A-10*)

Here, the panel majority has approved replacing the claimants' state law causes of action *in personam* with a claim against an artificially-imposed "limited fund." To be sure, the settlement does establish a limited fund: a res from which payment for all claims must be distributed. Indeed, for Fibreboard, the entire point of this settlement was to obtain a limit on liability that theretofore had been, quite literally, limitless. But that does not transform the plaintiffs' *in personam* claims against Fibreboard into *in rem* claims against the newly-established fund.

It is possible that the mounting costs of defending asbestos claims and paying asbestos judgments would have driven Fibreboard to take refuge in bankruptcy court.[12] This would be unfortunate for Fibreboard's shareholders and contract creditors, but it would not be catastrophic: The Johns-Manville Corporation went through an apparently successful bankruptcy reorganization and spun off the Manville Personal Injury Settlement Trust in order to satisfy its tort liabilities. See *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d at 725. And in any case, the specter of eventual bankruptcy does not now render this ongoing concern a "limited fund." Up until the time of a bankruptcy discharge, tort creditors have a legally unlimited font of money from which they may demand their due.

(*continued from page A-9*)

appropriate circumstances, to satisfy tort judgments. Finally, Fibreboard has announced that it is suing the tobacco industry for recovery in the nature of contribution, arguing that injuries caused by smoking aggravate injuries caused by asbestos. See *Asbestos Maker Sues Tobacco Industry*, N.Y. TIMES, Nov. 8, 1997, at D5. Any sums thus recovered will be available to pay tort judgments.

12 I note the indeterminacy inherent in this speculation: At what point does a "fund" become "limited"? A district court must assess the probability and likely amount of the claimants' recovery, and balance this against its estimation of the defendant's future ability to pay.

This proposed settlement class is in fact "a self-evident evasion of the exclusive legal system established by Congress for debtors to seek relief."[13] But here, the "constructive bankruptcy" is reached without the protections of the Bankruptcy Code: procedural protections — such as the creditors' vote on settlements — and substantive protections — such as tort creditors' preferred status. It is, moreover, a colossal bailout for Fibreboard's shareholders that would not occur in bankruptcy. Instead of approving this evasion of the mechanisms established by the legislative branch, we should be mindful that "the function of federal courts is not to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges." *In re Keene*, 14 F.3d at 733.[14]

---

13 See *In re Keene Corp.*, 14 F.3d 726, 732 (2d Cir. 1993), in which the court noted:

> Indeed, the process contemplated by [class proponents] mirrors a bankruptcy proceeding. The finding of a limited fund corresponds to a finding of insolvency. The preliminary injunction serves much the same function as the automatic stay under Section 362(a) of the Bankruptcy Code. 11 U.S.C. § 362(a) (1988). The class representatives correspond to creditors' committees in Chapter 11 proceedings. See 11 U.S.C. § 1102 (1988). The proposed mandatory class settlement mirrors a reorganization plan and "cram-down," see 11 U.S.C. § 1123, 1129(b), followed by a discharge, 11 U.S.C. § 1141(d).

Id. at 732 (citation omitted).

14 Commentators have questioned the propriety of using rule 23(b)(1)(B) as a means of avoiding bankruptcy proceedings. See, e.g., 3 NEWBERG ON CLASS ACTIONS § 17.15A, at 3S-16 (3d ed. Supp. 1994) (opining that "a 23(b)(1)(B) class should not serve as a substitute for bankruptcy proceedings"); see also, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of Mass Tort Class Actions*, 95 COLUM. L. REV. 1343, 1382-83, 1458-59 (1995); Richard Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 880-81 (1995); William Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 840 (1995).

The panel majority thus supplants the bankruptcy law with a judge-made system to extinguish the rights of tort creditors. And the panel ignores the obvious application of rule 23(b)(1)(B), which does not allow a defendant to limit its substantive liability through the creation of a limited fund — as was done here — but rather is a mechanism for the equitable distribution of a pre-existing fund.

But perhaps most striking is the panel's apparent disregard for principles of federalism and the limits of the Rules Enabling Act. Contrary to the Congressional mandate that the rules of civil procedure not "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072, this court now takes away state law rights of those who have been damaged in tort and allows the asbestos victims only a pro-rata share in an artificially-limited settlement fund. As a matter of law, this class cannot be certified under rule 23(b)(1)(B).

B.

Even assuming, arguendo, that rule 23(b)(1)(B) allows certification of a "limited fund" class of *in personam* claimants against a solvent ongoing concern and its solvent insurers, the panel majority erred in accepting the district court's factual decision that this is a limited fund. Fibreboard was recently acquired by Owens-Corning in a tender offer for about $515 million cash, plus $85 million of assumed debt. See Andrea Puchalsky, *Owens-Corning to Buy Fibreboard for $515 million*, WALL ST. J., May 29, 1997 at A4. This stands in contrast to the district court's finding, upheld by this court, that Fibreboard was worth no more than $235 million.

This discrepancy could indicate clear error, but at the very least it calls for a remand for new fact finding as to the value of Fibreboard as a potentially "limited fund." By issuing its new opinion, the majority declines, by implication, to permit the district court to reconsider that finding.

IV.

Although the Supreme Court's remand was specifically for reconsideration in light of *Amchem*, the instant matter has the procedural posture of an appeal from the entirety of the district court's judgment. In other words, the remand does not limit the scope of our review. Accordingly, I reiterate, briefly, some of the other points discussed in the original panel opinion and dissent, simply to indicate that these are still live issues important to our consideration.

For example, even if it were properly certified under rule 23(b)(1)(B), this class cannot proceed as a mandatory class in contravention of *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985). See *Ahearn I*, 90 F.3d at 1001-06 (Smith, J., dissenting). Moreover, this class — which by definition includes persons unaware of any injury or even exposure[15] — could never meet rule 23's requirement of notice to class members. See *Ahearn I*, 90 F.3d at 999-1000 (Smith, J., dissenting); see also *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2252 (citing the *Ahearn I* dissent with approval). Perhaps most importantly, this class — with legions of members who lack legally cognizable claims, and many members who have not even suffered injury-in-fact — cannot meet the irreducible minimum standards of justiciability under U.S. CONST. Art. III.[16] See *Ahearn I*, 90 F.3d at 1015-26 (Smith, J., dissenting); see also *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2244 (declining to reach jurisdictional issues before deciding "logically antecedent" rule 23 certification issues).

---

15 **Indeed, the class includes "persons" — the future children of persons exposed to asbestos — who had not yet been conceived at the time the complaint was filed.**

16 **Again, I call attention to the "future children" and "future spouses" categories of claimants. See *Ahearn I*, 90 F.3d at 1018-19 (Smith, J., dissenting).**

V.

Even if these reasons were invalid, this class must fail under *Amchem* because of the lack of common issues and the inadequately-representative named plaintiffs. The *Amchem* settlement class, similarly, failed to meet the "adequacy of representation" requirement of rule 23(a). *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2252. The Court stated:

> Nor can the class . . . satisfy Rule 23(a)(4)'s requirement that the named parties will fairly and adequately protect the interests of the class. The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. [A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.
>
> . . . In significant respects, the interests of those within the single [*Amchem*] class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.

___ U.S. at ___-___, 117 S.Ct. at 2250-51 (citations and internal quotation marks omitted).

A.

The *Amchem* Court firmly established three principles of law with respect to rule 23(a)(4). Perhaps most importantly, adequacy of representation must be analyzed as a procedural safeguard — a "structural assurance" that the class members' interests are protected, irrespective of the fairness of the outcome.[17] Id. at ___,

---

17 Of great importance here is a point recognized by the panel majority, that a settlement class "cannot proceed unless the require-

(*concluded on page A-15*)

117 S.Ct. at 2251. And it is the class representatives who matter: the named plaintiffs, not their lawyers. Furthermore, the Court's treatment of the issue makes plain that the adequacy of representation — or its converse, the existence of conflicts — is treated as a question of law, not as a factual matter to be proven by expert testimony.

1.

The *Amchem* Court was presented with a factual "no conflict" finding similar to the district court's finding in this case. The same legal ethics expert who testified in *Ahearn* testified in *Amchem* that he perceived no intra-class conflict, or that if there was a small conflict it was overwhelmed by the commonalities. See *Georgine* v. *Amchem Prods., Inc.*, 157 F.R.D. 246, 297-98 (E.D.Pa. 1994). The district court agreed. Id. In their briefs, the class proponents vigorously argued the factual "no conflict" determination to the Supreme Court. See, e.g., *Amchem* Brief for Petitioner at 45-49, 1996 WL 721641, at *45-49.

But the Supreme Court disregarded the expert's testimony and the *Amchem* district court's extensive findings of fact on the issue of representativeness. Cf. *Amchem*, ___ U.S. at ___-___, 117 S.Ct. at 2250-52. Instead, from its own review of the various and potentially adverse interests among class members, the Court determined that conflicts existed — without regard to the conclusions of expert witnesses or of the district

---

(*continued from page A-14*)

ments of Rule 23(a) are met, irrespective of whether the proposed settlement is deemed fair under Rule 23(e)." See also *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248 (holding that the fairness inquiry is "an additional requirement, not a superseding direction" to the requirements of Rules 23(a) and (b)). This directly contradicts *Adams Extract Co.* v. *Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195 (5th Cir. Apr. 1981). See, e.g., *id.* at 212 ("If the [settlement] terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel").

court. It is thus apparent from *Amchem* that the existence of conflicts is very much a question of law, not fact.[18]

As did the *Amchem* district court, however, the district court and panel majority here incorrectly have treated the conflict inquiry as a factual one. In *Ahearn I*, the majority stated that "[j]ust what measure of representation is adequate is a question of fact that depends on each peculiar set of circumstances." 90 F.3d at 977 (quoting *North Am. Acceptance Corp.* v. *Arnall, Golden & Gregory*, 593 F.2d 642, 644 n.4. (5th Cir. 1979)). The new majority opinion apparently draws on that conclusion when it says that "[w]e detailed in our prior opinion our agreement with the thorough study and conclusions by the district court, satisfying the requirements of class certification under Rule 23(a)." Now, in light of *Amchem*, we know this conclusion was incorrect: Adequacy is determined as a matter of law.

2.

The *Amchem* Court also emphasized the crucial distinction between the adequacy of the class representatives themselves, on the one hand, and the adequacy of class counsel, on the other hand. Thus, the *Amchem* Court, rather than looking at the plaintiffs' lawyers' competence or ethical conflicts of interest, questioned whether the named plaintiffs shared the same interests as did the class they purported to represent.[19] The

---

18 Of course, the underlying circumstances — for example that certain types of claimants are differently situated in the settlement value of their underlying claims — would be a factual matter.

19 Rule 23(a)(4) requires that both the named plaintiffs and the class counsel be adequately representative. The Court made this distinction explicit, noting, "we decline to address the adequacy-of-counsel issues in light of our conclusion that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class." *Amchem*, ___ U.S. at ___ n.20, 117 S.Ct. at 2251 n.20.

Court stated that the rule 23(a)(4) adequacy inquiry requires that "the named parties will fairly and adequately protect the interests of the class." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2250 (emphasis added, internal quotations omitted). Not just the attorneys, but also the named parties must be without conflict with the class they seek to represent. *Id.* This is especially true where, as here, claimants are deprived of the right to opt out. See *Ahearn I*, 90 F.3d at 1009 (Smith, J., dissenting).

3.

Throughout *Amchem*, the Court reminds us that the rule 23 class composition requirements are structural protections: prophylactic rules that must be applied even where a seemingly desirable result has been achieved without their help. Noting Congress's direction that the rules of procedure "shall not abridge any substantive right," 28 U.S.C. § 2072(b), the Court states that rule 23's "dominant concern" is whether "absent class members can fairly be bound by decisions of class representatives." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248. The adequacy inquiry is ultimately designed to protect the members' due process rights, to keep them from being bound in absentia by someone who does not adequately protect their interests. See *id.*; see also *Hansberry* v. *Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). In other words, the class certification inquiry does not examine the merits of the tradeoffs created by a settlement, but examines whether class representatives and class counsel had the authority to trade at all.

Amchem thus specifically rejects any attempt to circumvent the structural safeguards of rule 23(a) by looking only to the substantive fairness of the outcome under rule 23(e).[20] The rules "designed to protect

---

20 As one academic noted, "[D]ue process must mean something other than that the result is just, otherwise some lynchings would be consistent with due process." Susan Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1123 (1995).

absentees by blocking unwarranted or overbroad class definitions [ ] demand undiluted, even heightened attention in the settlement context." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248. Ignoring the class proponents' protestations that the settlement was fair, and that the class members' interest in achieving a fair settlement established a unifying interest among all the members, see *Amchem* Brief for Petitioner at 43-48, 1995 WL 721641, at *43-48, the *Amchem* Court unequivocally reiterated that structure must prevail over content.

It is not enough that a named plaintiff in fact works for the overall good of the class. A representative must "possess the same interest and suffer the same injury as the class members" and must be aligned in interest such that no conflicts exist between the representative and any "discrete subclasses" within the broader class he purports to represent. *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2251. *Amchem* demands a "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.* (emphasis added).

A corollary of rule 23(a)(4)'s mandate of unconflicted representation as a "structural assurance" is that any real conflict, even if minor when compared to interests held in common, will render the representation inadequate. Thus, *Amchem* did not weigh the myriad common interests within that class against the conflicts, in order to decide whether the conflicts were "de minimis" or were somehow overcome by the commonalities.

Rather, the analysis was explicitly focused on the mere existence of some intraclass conflict.[21] Cf. *Amchem*, ___ U.S. at ___-___, 117 S.Ct. at 2250-51. And the Court specifically stated that the class conflicts were

---

21 **The only intraclass conflict identified as such by the Court was the conflict between the currently injured and exposure-only plaintiffs. See *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2251. The same conflict, of course, exists here.**

not "made insignificant" by the ample funding provided by the settlement. *Id.* at ___, 117 S.Ct. at 2251. In accordance with *Amchem*, therefore, we should not care — because the Supreme Court did not — whether having maximum dollars in a settlement fund is in everyone's interest, or even whether that unifying interest seems to outweigh the singular and disunifying interests among the various *de facto* subclasses.

Amchem requires that the class representatives possess an identity of interest with the class they represent, and also that "the named plaintiffs operated under a proper understanding of their representational responsibilities." *Id.* Where discrete subclasses exist, each "separate constituency" must be represented as such:

> "The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups."

Amchem, ___ U.S. at ___, 117 S.Ct. at 2251 (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d at 742-43).

Therefore, in order for this class properly to be certified, exposure-only and pre-1959 representatives must have been representing the interests of their own subgroup, not the amorphous interest of the class as a whole. But there was no structural mechanism here to ensure that each discrete interest (such as the exposure-only claimants' interest in a lower damage cap) was given an advocate in the settlement negotiations. Rather, if these discrete interests were voiced at all, it would have been by someone perfectly willing — indeed, obligated by his duty to the class as a whole —

to subordinate that discrete interest to his conception of the broader interests of the class.[22]

B.

Two important conflicts exist between certain class members and their representatives.[23] The same conflict between present and future claimants identified in the *Amchem* class also is present here: "Most saliently, for the currently injured, the critical goal is generous immediate payments. This goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2251. Because of that conflict alone, this cannot go forward as a single class.

Furthermore, this class contains the additional conflict between the pre- and post-1959 claimants. These groups are treated alike under the settlement, even though their claims are worth vastly different amounts in the tort system.[24] These structural conflicts effect-

---

22 As discussed below, the terms of the settlement demonstrate why interested and express advocacy was necessary: It appears that the most cohesive and self-identified group — the presently injured — may perhaps unconsciously have advanced its own interests at the expense of the more diffuse and unidentified future claimants.

23 These two structural conflicts are not the only ones, however. For example, the direct claimants — who allegedly suffered injury from direct exposure to asbestos, and would recover under any tort regime — are in opposition to the indirect claimants — who only suffered injuries such as loss of consortium, and whose claims might not be cognizable in some states. See 41 AM.JUR.2D Husband and Wife § 247 (stating that jurisdictions may treat loss of consortium claims as derivative of the underlying personal injury, and thus a judgment in one establishes res judicata as to the other, or they may treat the loss of consortium claim as a distinct action). Obviously, negotiating the settlement's treatment of indirect claimants will pit these two groups against each other.

24. Before the settlement became imminent, the pre-1959 claims settled for an average of $12,000, while the post-1959 settled for only $4,000. Once the asbestos world expected that the settlement

(*concluded on page A-21*)

ively create discrete subgroups within the *Ahearn* class. Even if these conflicts are small in comparison to other arguable common interests, certification of the conflicted class was improper without proper subclassification and representation.[25]

Because the panel majority states that "there was no allocation or difference in the award, according to the nature or severity of injury," one is led to infer that the only interest that was ever in play here was the unitary interest of all the class members in receiving money. That inference is incorrect.

The settlement has two essential parts: a common fund and a mandatory process for distributing that fund. Even if all claimants are treated alike under the settlement — without regard to their status — this still

---

(*continued from page A-20*)

would go through, the pre-1959 claims settled for only $8,000, while the value of the post-1959 claims had risen to $7,000. MEALEY'S LITIG. REP. June 2, 1995, at 20.

25 I note, however, that the putative class's common interests are not overwhelming. The panel majority describes those interests as "suffering harm from asbestos exposure and seeking equitable distribution of compensation from limited funds." This is in accord with the original majority opinion, which essentially found the common interest to be maximizing and efficiently distributing the settlement. *Ahearn I*, 90 F.3d at 981.

Amchem refutes the proposition that the class members' common interest in achieving or maximizing a settlement could align their interests sufficiently enough to satisfy rule 23(a)(4). The district court that originally certified the *Amchem* class relied on this rationale: "So long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." *Georgine* v. *Amchem Prods.* , 157 F.R.D. 246, 317 (E.D.Pa. 1994). But the Supreme Court squarely rejected this rationale. The fact that everyone had an interest in receiving money does not suffice to ensure that the named parties would "fairly and adequately protect the interests of the class." See *Amchem*, ___ U.S. at ___-___, 117 S.Ct. at 2250-51. The putative class members' lack of common interests is dealt with at length in Part V, below.

reflects an allocation decision, with the various groups pitted against each other to receive parts of the fund.

In order to negotiate the settlement fund and establish the distribution process, the parties engaged in a series of compromises, attempting to balance the interests of the various subgroups in order to arrive at a settlement to the benefit of all. Thus, individual claims are capped at $500,000, regardless of the nature of the claim or when it manifests itself.[26] There is an outright ban on punitive damages. Pre- and post-judgment interest is eliminated, despite its availability in many jurisdictions and its obviously disproportionate impact on latent claimants. Claims arising under highly different legal systems — such as maritime versus non-maritime law, and common law versus civil code — are treated identically.

But perhaps the most salient allocation was the decision to treat the pre- and post-1959 claimants alike. It is true that the class as a whole benefited from this, and perhaps from each of the other compromises.[27] It is also true that the settlement treats everyone the same. But in so doing, it ignores the pre-settlement status — and rights — of the widely disparate groups of claimants.[28]

---

26 By contrast, mesothelioma claims had averaged tort recoveries in the millions. Also, consider how this cap reflects an allocation between latent claimants — who desire a low cap, in order to preserve the fund for when their injuries become manifest — and patent claimants — who would prefer high present damages.

27 It is axiomatic that the class as a whole was giving something up in return for the guaranteed settlement. Fibreboard and its insurers must have thought they were getting a good deal — that the settlement cost was less than their actual liability — or they would not have entered into the agreement. The question, though, is whether some claimants' rights were traded away, and whether those claimants were adequately represented.

28 This might be likened to an airline that eliminates both coach and first class seating, creating a new "business class" for

(*concluded on page A-23*)

The settlement forced the pre-1959 claimants to give up something of value that is legally their due — their cause of action against an insured Fibreboard — in order to benefit a group of claimants to whom they owe nothing. To deprive them of that right requires that the absent class members have been protected by rule 23(a)(4)'s structural safeguard of due process through representation.

It is immaterial that, arguably, the settlement might not have been different had it been negotiated with representatives of the subclasses. Likewise irrelevant is whether the settlement was fair and in everyone's best interest. The gravamen of prophylactic rules is that they must be followed even where they seem burdensome and inconsequential.

C.

The panel majority apparently believes the adequacy inquiry in this case to be distinguishable from that in *Amchem*, for this is a rule 23(b)(1)(B) action, while *Amchem* was not. That distinction is relevant, but it cuts against certification. Here, in a limited fund action, it is even more true that the class members were pitted against one another, and that their interests needed to be aligned with those of their loyal representatives.

In *Amchem*, the Court stated that "[a]lthough this is not a 'limited fund' case certified under Rule 23(b)

(*continued from page A-22*)

everyone, and then applies this new arrangement to a flight on which many of the seats have been sold. Those who bought a coach ticket are thrilled to receive a better level of service, but those who paid for first class have been deprived of their due. Even if the group as a whole is better off — for the many coach passengers' happiness outweighs the few first class passengers' disappointment — this would be unacceptable.

In economic terms, this result would be *Kaldor-Hicks* optimal. But here, in order not to divest vested rights, any acceptable result must come closer to *Pareto* optimality.

(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability." ___ U.S. at ___, 117 S.Ct. at 2251. Thus, even though the *Amchem* defendants had a theoretically unlimited supply of dollars with which to pay future claimants — so that the allocation of dollars was not a zero-sum game, and class members' potentially conflicting interests were thus arguably not pitted against one another — still, that settlement made "essential allocation decisions" by which some class members won and some lost. Thus, the Court worried that the settlement had chosen winners and losers "with no structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.*

Here, there is no question that the settlement makes "essential allocation decisions." This is, after all, a "limited fund" class, in the view of the panel majority. If that is so, there is only one apple, and anyone who might ever assert a claim against the defendants is fighting for a bite of it. The need for adequate representation is even more important where, as here, one person or group loses for every time another person or group wins.

The settlement's terms reveal its inter-group allocative effect. The high cap on damages hurts latent claimants (who would prefer a lower cap to ensure that there is some money left when their injuries finally become manifest), while patent claimants benefit. The ban on punitive damages hurts claimants from jurisdictions where such awards are generally available, saving a larger slice of the apple for those for whom punitives would not be available. Perhaps most egregiously, the settlement eliminates the privileged status of the pre-1959 claimants (who were covered by Fibreboard's insurance policy) and places them on equal footing with the post-1959 claimants (whose claims were largely uninsured). This settlement undeniably picks winners and losers.

A limited fund only increases the potential of intra-class conflicts. If the settlement in *Amchem* was legally flawed, this one is even more so. Where, as here, there are significant and potentially adverse subgroups within a class, their interests must be protected by representation as such.

Although recognizing that the class representatives might have thought the settlement in the best interests of the class as a whole, the Court in *Amchem* demanded a "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.* at ___, 117 S.Ct. at 2251. This case demands no less.

VI.

The *Amchem* class was rejected also, in part, because common questions of law or fact did not predominate over questions affecting only individual class members. See *id.* at ___, 117 S.Ct. at 2249 (citing rule 23(b)(3)). That analysis does not directly control the instant supposed "limited fund" class, for rule 23(b)(1)(B) imposes no such predominance requirement, but calls only for rule 23(a)(2) commonality. And, noting that for rule 23(b)(3) classes the test of commonality is subsumed under or superseded by the more stringent predominance inquiry, the Court declined to address commonality as such. *Id.* at ___, 117 S.Ct. at 2243.

Here, where common issues need only exist, not predominate, *Amchem*'s ultimate conclusion has no bearing on the type and relative significance of the issues necessary to pass muster under rule 23(a)(2). The *Amchem* analysis is still pertinent, however, for *Amchem* speaks directly to the relevance of the settlement to either inquiry. *Amchem* tells us what sort of common issues may be considered: whether they must preexist the settlement, or whether an interest in the settlement itself may provide the common issues in satisfaction of rule 23(a)(2) or rule 23(b)(3).

Amchem tells us that, although a settlement is "a factor in the calculus," ___ U.S. at ___, 117 S.Ct. at 2249,[29] the parties' interest in the settlement will not suffice to establish a "common interest" among the class members. "The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme . . . is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Id.* (emphasis added). "If a common interest in a fair compromise could satisfy the predominance requirement . . . , that vital prescription would be stripped of any meaning in the settlement context." *Id.* at ___-___, 117 S.Ct. at 2249-50.

The class proponents would object that by its terms, this rule speaks only of "predominance," not "commonality." Here, though, that is a distinction without a difference. That the predominance inquiry imposes a higher standard — by requiring not only that the common issues exist but that they outweigh the uncommon issues — is irrelevant, for the Court made explicit that the issues themselves — whether they must be "predominant" or simply "common" — must arise from interests that preexist the settlement.

That there is a settlement, or that it is fair, does not eliminate or modify the other requirements of rule 23. *Id.* at ___, 117 S.Ct. at 2248. The plain text of rule 23 requires the putative class to meet its requirements by

---

29 The Court found the fact of and terms of a settlement relevant in only three contexts: (1) The terms of the settlement may indicate whether the absentees' interests are adequately represented. ___ U.S. at ___-___, 117 S.Ct. at 2248. (2) The fact of a settlement also eliminates the need for a rule 23(b)(3)(D) manageability inquiry. *Id.* And (3) when a class is a settlement-only class, it requires that heightened attention be given to the class definition, as there will be no way to refine and adjust the class as litigation unfolds. *Id.*

reference to the intrinsic features of the class members' claims, not to the settlement. *Amchem* reminds us that courts "lack authority to substitute for rule 23's certification criteria a standard never adopted — that if a settlement is 'fair,' then certification is proper." *Id.* at ___, 117 S.Ct. at 2249. A court must apply the "criteria the rulemakers set." *Id.*

A settlement cannot itself be used to establish commonality, because to do so would cripple the settlement process from its inception; a putative class unable to meet the requirement of rule 23(a)(2) without the "commonality" established by a settlement could never be certified for litigation. And if settlement were allowed despite the impossibility of litigation, class counsel "could not use the threat of litigation to press for a better offer," and the resulting settlement would be a one-sided deal that sells out the plaintiff class for a pittance and works only in the true interest of the defendant and its insurers and the attorneys for both sides. See *id.* at ___-___, 117 S.Ct. at 2248-49. For policy reasons as well as adherence to the text of the rule, then, *Amchem* mandates that every class meet the rule 23 certification requirements independently of any common interest they might share in obtaining or maximizing the proposed settlement.

In its original opinion, the panel majority relied exclusively on the common interest of the class members in the settlement, citing *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 211 (5th Cir. 1981),[30] for the proposition

---

30 I reiterate that *Corrugated Container*'s reliance on the fairness of, and interest in, the settlement is invalidated by *Amchem*. Also in doubt is the viability of *Meat Price Investigators Ass'n v. Iowa Beef Processors (In re Beef Indus. Antitrust Litig.)*, 607 F.2d 167 (5th Cir. 1979), in which this court stated: "[A]s the law now stands, tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge." *Id.* at 174.

that "the terms of the settlement were vitally important to the determination that certification was appropriate." *Ahearn I*, 90 F.3d at 975. The majority went on to cite other authority for the proposition that "in the settlement class context, common issues arise from the settlement itself," *id.*, and then applied its view of the law to the putative *Ahearn* class:

> The district court, in its findings of fact, found that the entire Global Health Claimant Class had the following issues in common:
>
> (i) avoiding the potentially disastrous results of a loss by Fibreboard in the Coverage Case appeal;
>
> (ii) maximizing the total settlement contribution from Fibreboard and the Insurers;
>
> (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transactions costs and delays in compensation;
>
> (iv) minimizing the percentage of their compensation diverted from them to pay attorneys' fees; and
>
> (v) adopting procedures that provide for payments to claimants in an equitable manner.
>
> The intervenors do not disagree that the settlement class holds these issues in common. Instead, they argue that these issues do not support a finding of commonality because they are derived from the settlement rather than from the *Ahearn* complaint. As we noted above, this argument has no merit and is foreclosed by our holding in *Container I*. Because the evidence is overwhelming that the class holds the above issues in common under the settlement (even the intervenors concede this point), we agree with the district court that the *Ahearn* action

> and the Global Settlement Agreement presented it with questions of law and fact common to the entire Global Health Claimant Class.

Id. at 975-76. This passage makes apparent that the panel majority based its finding of commonality solely on the now-discredited theory that the class members' interest in the settlement itself is sufficient to fulfill rule 23' s commonality requirement.[31]

In its latest opinion, the majority addresses this point in one sentence: "All members of the class, and all class representatives, share the common interests: suffering from asbestos exposure and seeking equitable distribution of compensation from limited funds." As I have said, the latter "interest" in the settlement fund, because it does not preexist the settlement, cannot establish commonality. And the putative interest in "suffering from asbestos exposure" is simply inadequate.

To begin with, it is factually incorrect to say that all the class members have "suffered from asbestos exposure."[32] The futures claimants, of course, have, by definition, "suffered" nothing, although presumably they have been exposed. Likewise, the future children and future

---

31 The common issues described by the district court and the first panel opinion are remarkably similar to one of the common issues relied on by the *Amchem* district court and squarely rejected by the Supreme Court: "their common 'interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system.'" *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2249 (quoting *Georgine* v. *Amchem Prods., Inc.* , 157 F.R.D. at 316). This benefit, the Court held, "is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry." *Id.* (emphasis added).

32 This "interest" is like the "interest" the majority identified in its prior opinion: that, in addition to the now discredited "interest in the settlement" theory, commonality exists because "Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos." See *Ahearn I*, 90 F.3d at 975-76.

spouses of persons exposed to asbestos have suffered nothing and have been exposed to nothing.

Presumably the majority means that by the time their claims ripen and become justiciable, every class member will have a common interest in that he will deserve some compensation from Fibreboard that in some way stems from Fibreboard's manufacture of asbestos. At such an extreme level of generality, the members of this class conceivably could possess some level of commonality. But this is not a justiciable common interest sufficient to maintain the class.

Consider a commercial airline that suffers several disasters: one in Oregon, one in Louisiana, and one off the coast of Brazil. The owners of property that is damaged when the plane crashed into it, the bystanders injured by flying debris, and the deceased passengers' and crewmembers' next of kin all have "suffered from" the crashes.[33] But no federal court would allow these disparate groups, under dissimilar legal systems, asserting divergent legal claims, all to join together under the aegis of their common "suffering from the airplane crashes."

In such a case, then, the superficial commonality of having suffered some injury will not suffice. Instead, the common issue must be necessary to the theory of recovery: "[T]he individual's claim and the class claims [must] share common questions of law or fact." *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 157, 102 S.Ct. 2364, 2370, 72 L.Ed.2d 740 (1982) (emphasis added). And it must be significant:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guide-

---

33 **The reader may add facts as needed to sustain the analogy. For example, the claims against the airline add up to a lot of money, so by the panel majority's reasoning, one might consider the airline and its insurers a "limited fund."**

> posts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

Id. at 158 n.13, 102 S.Ct. at 2371 n.13. It is not enough for some general sort of commonality to exist. The commonality must be justiciable: It must derive from a substantial legal or factual question that is necessary to the class members' theories of recovery.

It might be that the members of the putative *Ahearn* class do have issues in common, issues preexisting and apart from the settlement. It might also be that these issues would suffice to establish rule 23(a) commonality. The district court and the panel majority did not cite any such common issues, however.

In fact, the gist of this class is that the driving commonality was the class members' interest in the settlement itself: that in order to keep the defendants from going bankrupt and to forestall a possibly disadvantageous result in the insurance litigation, the plaintiff class members found it in their common interest to settle. *Amchem* tells us this is not enough.

VII.

In sum, this class cannot go forward. It cannot be certified as a "limited fund" class under rule 23(b)(1)(B), because it does not concern such a "limited fund," but rather is an aggregation of claims against a solvent, ongoing concern and its insurers.

But even if this class did involve a "limited fund" under rule 23(b)(1)(B), *Amchem* makes plain that it must still fail the requirements of rule 23(a). The pre- and post-1959 claimants and the patent and latent claimants are discrete and often adversarial subgroups. That the class structure fails to recognize these groups

as such and to afford them proper representation causes the class to fail the adequacy requirement of rule 23(a). Further, because *Amchem* will not allow commonality to stem from a putative interest in the settlement itself, this class must also fail for want of common issues.

The panel majority embraces a settlement that it considers a triumph of practicality. In doing so, it casually dismisses the teaching of *Amchem* and blesses a class that falls far short of legal and constitutional requirements. I do not believe the Supreme Court spoke cryptically in vacating our earlier opinion while articulating, in *Amchem*, the specific standards for us to apply on remand. Because the majority adheres to an opinion that is foreclosed by the Court's reasoning, I respectfully dissent.

TRANSCRIPT OF ORAL ARGUMENTS

(United States Court of Appeals — Fifth Circuit)

(Proceedings of November 12, 1997)

(JAMES FLANAGAN, ET AL., APPELLANTS, –VERSUS– GERALD AHEARN, ET AL., APPELLEES — NO. 95-40635)

Oral Arguments taken in the above-entitled cause before Brenda H. Andrus, Certified Court Reporter, taken at the United States Court of Appeals for the Fifth Circuit, West Courtroom, 600 Camp Street, New Orleans, Louisiana 70130, on the 12th day of November, 1997.

APPEARANCES:

PANEL: Judge W. Eugene Davis;
Judge Jerry E. Smith

FOR THE APPELLANTS: Steve Baughman, Esq.;
Mike J. Connor, Esq.

FOR THE APPELLEES: Elihu Inselbuch, Esq.;
Herbert M. Wachtell, Esq.

* * *

JUDGE DAVIS: We're here to hear the argument of *Flanagan* v. *Ahearn* primarily on the question of the effect of the impetus of the decision on our case. Judge Reavley was unable to be with us today, but we'll provide him with a tape. First we'll hear from Mr. Baughman.

MR. BAUGHMAN: May it please the Court, Steve Baughman on behalf of the Ortiz appellants. The district court's class certification order is utterly and irreconcilably incompatible with the Supreme Court's decision in *Amchem Products* v. *Windsor*. *Amchem*'s overall theme, its holdings, the language, and the reasoning underlying its holdings and its *dicta* all mandate that this court reverse and remand to the district court with direction to decertify the class.

There are five separate legal issues in this case, all of which *Amchem* has a dispositive impact upon. First, the commonality and typicality requirements of the Federal Rules of Civil Procedure 23(a) are not satisfied here because there is not sufficient unity or cohesion among these class members with respect to the individual personal injury claims for damages.

JUDGE DAVIS: The *Amchem* really didn't talk about commonality, did it, because it wasn't relevant to that case?

MR. BAUGHMAN: Well, Your Honor, *Amchem* talked about predominance in the context of the Rule 23(b)(3) class action, and that is whether or not common issues of law or fact predominate over any individual issues in the case. Of course, that is related to the commonality requirement. It's just a more stringent requirement than the commonality requirement of Rule 23(a).

But in this case, well, No. 1, the language in the reasoning of the Supreme Court in the *Amchem* decision with respect to predominance applies equally to the Rule 23(a) requirements as far as the impact of settlement on the analysis. And, secondly, the settling parties apart from the allegations with respect to commonality as to the loss of insurance coverage risk have identified no common questions of law or fact and those no common questions of law or fact with respect to the individual personal injury damages claims.

JUDGE DAVIS: I thought the opinion just rolled past commonality where it says even if Rule 23(a) commonality requirements may be satisfied, a shared experience of exposure to asbestos products and the predominance criteria is far more demanding.

MR. BAUGHMAN: I think that that's right, Your Honor. In the context of a (b)(3) class, it's easy and appropriate for the Court to blow by the commonality requirement because the predominance requirement is more stringent. And I don't deny that, Your Honor. But the Court cannot blow by the commonality requirement —

JUDGE DAVIS: How does *Amchem* affect our earlier decision or what impact or effect does it have on our earlier decision?

MR. BAUGHMAN: It has this impact and effect, Your Honor. It does set out what role a settlement does and does not play with respect to the propriety of class certification. And it says that a settlement is relevant to class certification but in two very limited ways.

First of all, if it's a (b)(3) class, which this one of course is not, then the manageability criterion of Rule 23(b)(3)(D) is satisfied if the case is settled because you don't have to look to see what would happen at a trial.

And, secondly, with respect to the adequacy of representation, the Court said that it is very important to look at the terms of the settlement to see if there are any problems with the way that the class was represented that would not be apparent or were not apparent by looking at the face of the complaint.

But the Court said with respect to all the other requirements of Rule 23, including commonality and including typicality, that all requirements that are designed to ensure that there is not an overbroad class definition, that the class is sufficiently cohesive to justify representative action in the first place, all of those requirements of Rule 23 not only must receive equal attention in the context of settlement, but perhaps even heightened attention.

And that is directly superseding what this court said in its prior opinion which was that commonality can emerge from the settlement itself. And the *Amchem* court rejected that, not only with respect to commonality, but also with respect to typicality, which I think this court can treat as a pair with respect to this case.

JUDGE SMITH: So you're saying that those elements are things that the Supreme Court described in its questions that it's preexisting any settlement?

MR. BAUGHMAN: Yes, Your Honor. Not only do they have to preexist any settlement, they have to be set

from the claims that are pled in the complaint and certified for class treatment. In this case the claims that have been pled in the complaint and certified for class-wide treatment by the district court are individual personal injury damages claims. They are not claims with respect to securing insurance coverage on behalf of Fibreboard Corporation.

Mr. Ahearn may well have been able to file some sort of an intervention action in the California state court proceeding that was ongoing with respect to Fibreboard's insurance coverage, but that was not what this case was about.

This case was about substituting for the lawsuits that individual members of this class could file for damages against Fibreboard now or in the future, substituting for their substantive rights under state laws, an equitable claims distribution process and administrative claims procedure, just as the *Amchem* settlement did with respect to the class members in that case.

Secondly, *Amchem* established that the conflict among certain groups of class members in this case preclude any finding of adequacy of representation. The conflict between currently injured members of this class and members who have not yet suffered any injury is the same or virtually identical in this case as it was in *Amchem*, and the Court's holding with respect to adequacy in that case precludes adequacy in this one.

JUDGE SMITH: Does that also apply to pre- and post-1959 conflict in this case? I realize that was not present in *Amchem*.

MR. BAUGHMAN: That's correct, Your Honor. I believe that the *Amchem* holding on adequacy is also applicable with respect to the conflict in this class of pre- and post-'59 class members. Obviously, you have to actually apply the law to the facts for that analysis as opposed to the conflict being nearly identical with respect to the exposure only versus the currently injured.

And, third, the *Amchem* Court repeatedly emphasized that courts must interpret and apply Rule 23 so that its

application will not violate the Rules Enabling Act by bridging, enlarging, and modifying substantive right.

Now, after *Amchem*, this court can no longer ignore the fact that the very purpose of the mandatory certification in this class was to just bridge, enlarge, and modify substantive rights of class members vis-à-vis one another.

The purpose of the certification here was to impose limitations on the rights of currently injured class members in order to preserve assets for class members that get sick later on. That is a substantive adjustment of rights and it is not permissible under the Rules Enabling Act.

Fourth, the Court in *Amchem* voiced very grave concern as to whether notice in the cases involving future claims for latent toxic injuries could ever satisfy Rule 23 or due process. And, in fact, the Court in discussing that issue, although it did not reach the merits or decide the issue, it did approve cite judgments in this case.

JUDGE DAVIS: It said it may be a problem on the effect of the decision.

MR. BAUGHMAN: That's correct, Your Honor, but the language is there for a reason. And the reason, I believe, is to give guidance to the lower federal courts as to whether or not that notice is proper or not. And at the very least, the Court expressed what it called very serious grave concerns about whether or not that could ever be possible.

JUDGE SMITH: I think both sides agree in the substantive briefs that that's *dicta*.

MR. BAUGHMAN: It is *dicta*, Your Honor, but *dicta* is meaningful. *Dicta* from the Supreme Court is particularly meaningful. It is law. It has less effect, obviously, than if it were a holding, but the language has to be in there for some purpose.

And, fifth, the Supreme Court said that if it had upheld the class certification in *Amchem* or its holding with respect to class certification had required a

remand to the district court for further findings, then the subject matter jurisdiction issues in the case would have loomed much larger.

Now, again, the Court did not address the merits of the issues, but again the language is there for a reason and a purpose. And the purpose has got to be to give guidance to the lower federal courts about the seriousness of the subject matter jurisdiction allegations in that case which are again virtually identical to the arguments with respect to the absence of subject matter jurisdiction in *Ahearn*.

Now, turning back again to the commonality and typicality requirements of Rule 23(a), by its terms, Rule 23 requires that there be a common question of law and fact with respect to the claims alleged and the claims certified and the claims released by the settlement and that the claims of the named class representatives must be typical of the absent class members.

You may recall from the first argument in this case that Mr. Wachtell on behalf of the settling parties conceded that absent a settlement, this case could not go forward as a class action.

JUDGE DAVIS: Well, the Supreme Court said it is a fact to be considered. Why is that inconsistent?

MR. BAUGHMAN: It's inconsistent, Your Honor, because the Supreme Court was very careful in discussing and limiting how the settlement is a factor. And a settlement clearly under the Supreme Court's language is not a factor for purposes of specifications of the Rule that are designed to protect absentees by blocking unwarranted or overbroad class definitions.

Now, clearly, the Rule 23(a) requirements of commonality and typicality are specifications of the Rule designed to protect absentees by blocking unwarranted overbroad class definitions. The only way that a settlement is relevant, according to the Supreme Court, to class certification is with respect to the manageability inquiry that's not present in this case, No. 1; and, No. 2, with respect to trying to investigate to see if there are

additional adequacy of representation problems raised by the settlement that would not have been apparent merely by looking at the face of the complaint.

So Mr. Wachtell was not saying that the settlement here obviously created any adequacy problems. Nor was he saying that the manageability inquiry applied. What he was saying is that the settlement created common and typical issues itself that were not present without the settlement. That is exactly what the Supreme Court rejected in *Amchem*.

Moreover, there are exposure to product cases. Judge Davis, you suggested from some language in Justice Ginsburg's opinion that perhaps exposure to the asbestos-containing products themselves is a common issue of law or fact. But, actually, it's just the opposite. It's a definition. It defines class membership, but it's an individual issue of fact.

Each and every member of this class, in order to establish class membership and in order to establish a right to obtain damages against Fibreboard, would have to show the separate and individual and unique circumstances of their own exposures which, of course, differs from class member to class member.

With respect to adequacy of representation, there are, as Judge Smith and I discussed just a moment ago, two separate interclass conflicts in this case, both of which preclude a finding of adequacy of representation as interpreted by the Supreme Court in the *Amchem* decision.

The first of those is almost an identical conflict as what was present in the *Amchem* case, and that is that there are members of this class such as Esteban Ortiz, the objector and appellant here, that already have an asbestos-related injury and could, absent the injunction that was entered by the district court four years ago, have sued Fibreboard, gotten a trial, obtained a judgment, and enforced that judgment in full against Fibreboard. But the injunction prohibited him from doing that, and the class certification in this case prohibited him from doing that.

JUDGE DAVIS: That *Findley* case from the Second Circuit that the Supreme Court approved, that's a (b)(1)(B) class?

MR. BAUGHMAN: That's correct, Your Honor. That was a (b)(1)(B) class arising out of the restructuring of the Johns-Manville Bankruptcy Trust. The Manville Bankruptcy Trust as originally structured was running out of money, and Judge Weinstein decided that the lawyers ought to try and restructure it.

And they did that and they did it through the vehicle of a Rule 23(b)(1)(B) limited funds class action using the trust itself as a res, r-e-s, that was being restructured.

JUDGE DAVIS: Didn't they have presently injured and futures in that class, too —

MR. BAUGHMAN: That is correct, Your Honor.

JUDGE DAVIS: — that the Court required subclasses?

MR. BAUGHMAN: In the original opinion of the Second Circuit, Your Honor, the Court determined that subclasses were necessary with respect to those groups. And the *Amchem* decision quotes extensively from that decision, the first decision of the Second Circuit.

JUDGE DAVIS: But it doesn't disapprove the modification either, does it?

MR. BAUGHMAN: No. The *Amchem* decision doesn't speak one way or the other to the modification, but it does certainly approvingly cite the language from the first opinion that required subclassing in this context, which implicitly rejects all of the settling parties alleging as to why 23(b)(1)(B) cases can't ever require subclasses because there's a need for a unitary resolution and how the case is distinguishable because supposedly people like Mr. Ortiz who are already currently injured have no substantive right to go out and get relief against Fibreboard.

I can't make any sense of that, Your Honor. They do have that right absent this case. They do have the right to sue, pursue, and enforce a judgment against Fibreboard.

JUDGE DAVIS: But in *Findley*, as I read the final decision, they said that subclasses were not necessary except in the instance where they had a different compensation scheme for the severely injured and the non-severely injured. And because of the different compensation scheme, subclasses were necessary. Isn't that essentially what they said?

MR. BAUGHMAN: I don't think so, Your Honor. I believe that the Second Circuit's opinion on rehearing establishes that the reason why its first opinion was being modified was that they had determined that they were mistaken about whether or not the timing element of how currently injured people were treated differently, the first-in-first-out sort of ordering mechanism that was established initially under the trust, was not substantive.

It wasn't part of the original substantive rights that were established by the trust mechanism. That's quite different from the substantive right of somebody who is already injured to pursue a claim against Fibreboard in the tort system in state or federal courts in this country.

Those substantive rights are very well established by the common law, and it's not subject to whatever the particularity of the particular specific trust mechanism that was at issue in the *Manville* case.

JUDGE DAVIS: The Supreme Court in *Amchem* paid a lot of attention to the details of the settlement in the *Amchem* settlement. And they are strikingly different from the one in our case, are they not?

MR. BAUGHMAN: There were different provisions, different limitations put for purposes of class certification, Your Honor. The important thing to realize is what this court must address is whether or not there is sufficient cohesion to justify representative action in the first place. In other words, the issue is not what limitations were imposed in *Amchem* as versus what limitations were imposed in *Ahearn*.

JUDGE DAVIS: Well, the whole point of the *Amchem* decision and class certification, and the Court obviously

thought it was as evidenced by the long discussions about it.

MR. BAUGHMAN: And I submit, Your Honor, that if this case is presented to the Supreme Court, the Supreme Court will extensively discuss the limitations that are imposed on class members' claims by the Ahearn Trust.

The point is that limitations were imposed at all because without the class certification with respect to the individual damages claims, there would not have been any authority in either *Amchem* or *Ahearn* to trade off or impose limitations on those class members' claims at all. The class certification —

JUDGE DAVIS: We'll move on to rebuttal now.

MR. BAUGHMAN: Yes, Your Honor, just to answer this question. The class certification order in both cases authorized the class representatives to release, limit, give up claims of all class members with respect to individual damages. Now, there are different limitations. The trade-offs were different in the two cases.

That's only relevant under Rule 23(e) to determine which settlement was more fair than the other. But as to whether or not that authority should have been given at all, that's an issue that is relevant to class certification and which is not met either in *Amchem* or in this case.

JUDGE DAVIS: Mr. Connor.

MR. CONNOR: Good afternoon. I'm Michael Connor on behalf of the Middleton Flanagan intervenors below the appellants. I do have five minutes, and your very efficient clerk asked me if I wanted to divide that. I will take all of my time at this time.

I wanted to address again the adequacy of the representation. I think that there are three very serious conflicts that in this instance would preclude the certification. Two of those are addressed at least in part, one of those being the present, or extant, injuries versus the latent injuries.

And it seems to me that it's very, very clear from *Amchem* that there is going to be a necessity for indi-

vidual representation, individual counsel when that kind of conflict exists. It existed in *Georgine*. It exists in *Ahearn*.

There's also the pre-1959. And just so the record reflects it briefly, in the case of the pre-1959, of course, that triggered the insurance that Fibreboard had. The post-1959, they would have to go to the very limited Fibreboard's assets themselves.

In the case of the 25,000 Merchant Mariners that were negotiating with Fibreboard at the time the settlement came down, it deprived them effectively of their right to trial, at least an unlimited trial, by placing significant hurdles in their way and giving an opt out that limited them to $500,000 damages. Of that number of 25,000, something in the area of 70 percent had pre-1959 exposure on board the vessels with Fibreboard asbestos products.

What that means is that clear preference of the pre-1959, a preference that was reflected in the average settlement in 1993 of $12,000 per pre-1959, and $4,000 for the post-1959, ended up after the settlement in leavening that off in 1994, to the pre-1959 having an average settlement of $8,000 and the post-1959 having an average settlement of $7,000. I would presume if we ran the same statistical test today, we'd find essentially the same.

In other words, what happened, and the Court addressed it very briefly, is that the pre-1959, having no representation whatsoever — and as the Court pointed out, in fact, using it as an explanation stated that Fibreboard would not negotiate those separately — had to give up their rights without representation either by a subclass or by counsel in order that they could secure a settlement for the entire group.

JUDGE DAVIS: My recollection of the record is that a settlement was agreed to between the presently injured which I assume to include all of the pre-'59. That was a done deal before the futures settlement ever came under consideration. That figure never changed. So if

they negotiated that settlement over arms-length, what do they have to complain about?

MR. CONNOR: That isn't really what I'm referring to. This is another conflict, I believe.

JUDGE DAVIS: All the present claimants, wouldn't all the pre-'59 people fall into the present claims?

MR. CONNOR: No, certainly not. Of the 25,000 mariners, for instance, none of those were filed. We filed 9,000 cases two days after the cutoff when we found out that they were going to have a cutoff, and we couldn't quite make it in time. That was an artificial date. But of those 25,000, approximately 17,000 have pre-1959 exposure and none of those are in the individual case file.

But that is the third conflict, and I believe that that is an extremely important conflict. That is a conflict of nez motley [*sic*]. That's a conflict of nez settling [*sic*]. At the same time they have negotiations going on for the global settlement, they are settling their individual cases.

And the individual cases were settled in a manner which they got 50 percent in front at the time, but the remaining 50 percent would not be paid until such time as there was either a global settlement of the futures or a favorable result in the coverage case.

The only way they could ensure that they would get that additional 50 percent — which after all, they were going to be recompensed on a contingency basis — the only way they could ensure that was to have a global settlement, nō opt out, futures only. And it seems to me that, as was suggested in the sentence below, that there is a possibility for exclusion. It's a tremendous temptation.

And in this case, indeed we do know that the individually filed cases were settled at a tremendously inflated rate. I know there's reasons given for that. The reasons were that they wanted to get the coverage people to the table. But, indeed, what it amounted to is once that deal was made, the only way they could get the additional 50,000 was either favorable result in that coverage case or they had to have a settlement of the futures.

And that is a tremendous temptation to sell off the futures, at the very least those 17,000. Those 25,000 mariners who lost their right to trial unless they exposed their case, went to settlement, had mediation, had arbitration, had a second settlement, and then went through the back door with their damages limited to $500,000, they would not have given up that right.

JUDGE DAVIS: Thank you. Mr. Inselbuch.

MR. INSELBUCH: May it please the Court, I'm Elihu Inselbuch. I was of counsel to the plaintiffs' class. I have our time, plus I've conceded Fibreboard's counsel ten minutes, Fibreboard's counsel Mr. Wachtell who will take the remaining ten minutes of our time. I will address the same issues as Mr. Baughman and Judge Connor did in perhaps a different order.

I would submit that the *Amchem* case and this case are entirely different in fact patterns. And although they may have some issues in common and while there is teaching from the Supreme Court that affects some of the issues in this case, it is a mistake and one must blink reality to pretend that the two cases are on all fours. I heard nothing from Mr. Baughman about what the district court and this court found to be the common issues.

And I think the best place to look for that is perhaps in the memorandum that the district court entered which is found at Ortiz appellant's record excerpts Volume 2, Tab 8, where the Court said at page 45, "All Class (b) members here have an overriding common interest in the limitations of risk posed by the coverage litigation and create a substantial fund and insurance proceeds to provide compensation for class members.

Consequently, many major issues presented by the class are common to all of its (b) members, including whether claimants against Fibreboard have a right to substantial insurance proceeds, notwithstanding the existence of a coverage dispute and whether some curtailment of the class' rights in the tort system is appropriate

in order to enable a resolution of the coverage dispute that equitably distributes the insurance proceeds.

That was what this case was about. That's all the litigation was about below. That's what the litigation between Fibreboard and its insurers was about. That's what the litigation between plaintiffs and Fibreboard and its insurers was about in California where they were testing whether or not Fibreboard could cut off CNA's rights in litigation that was based upon settlements entered into between the plaintiffs and Fibreboard.

That's what the litigation was about between Fibreboard and its two insurers in the district court below where they were arguing about whether or not a settlement with one insurer could cut off the rights of other insurers. The focus of this dispute was whether or not there would be a fund zero dollars or lots of dollars in order to pay the claims of the asbestos victims whose claims would mature in the future.

And it blinks reality to suggest that what the district court was certifying was a garden variety tort case. That's what *Amchem* was and that's what this was not. But, yes, we still learn from *Amchem* that we must look beyond the settlement to evaluate whether or not Rule 23(a)(2) rather than Rule 23(a)(3) and Rule 23(a)(4) have been satisfied.

And I submit to you that this district court and the panel below the last time around clearly found that the common issues existed. This court at 90 Fed 3d 976 held the named plaintiffs settled *Ahearn* because of their desire to avoid the risks of insurance coverage litigation and to ensure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment.

That's what this was about. That's what the district court said this was about. And the claims of the class representatives were typical of all Class (b) members in that report. And there is nothing, nothing in the Supreme Court's opinion that changes those facts or those issues.

Now, to turn to (a)(4), adequacy of representation, if this court were to adopt Mr. Baughman's analysis of when a conflict exits, it would in effect repeal Rule 23(b)(1) and (b)(2) because what the *Manville* Second Circuit Court teaches us is, yes, where there is a right, an enforceable right to a preference that some members of the class have over other members of the class — and in *Manville* I argued both arguments.

In *Manville* what you had was a FIFO queue for processing of claims, and the Second Circuit decided the first time around that if you were early enough in the FIFO queue, that gave you a substantive right, a legally enforceable right, to be paid 100 cents on the dollar before people further down the line got anything and, in fact, to the detriment of other people down the line who would get nothing.

That's the race to the courthouse that 23(b)(1)(B) is all about. It's to prevent that race. It's to prevent some members of the class for one reason or another in the tort system who get to the pot first from collecting money to the detriment of people with equal rights to that grease.

JUDGE SMITH: That doesn't answer the question, though, as to whether once they get to the courthouse, they shouldn't have class representatives and class counsel to represent the various disparate interests that the Supreme Court spoke to in *Amchem*.

MR. INSELBUCH: With all due respect, Your Honor, as the Second Circuit said in its rehearing opinion and as it held and as the Supreme Court cited with the approval, there is no disparate interest that's enforceable. There is no interest that anyone has to take more. That doesn't mean that every member of the class wouldn't want to take more.

JUDGE SMITH: Well, the Supreme Court spoke, as you know, very forcefully in *Amchem* to the different interests between the exposure only plaintiffs and the currently injured.

MR. INSELBUCH: Yes, Your Honor, in the context of no defendant urging there was a limited fund. There were unlimited assets for all of these people to recover. And the differences were created by the settlement.

JUDGE SMITH: And what the Court indicated there was, that that problem is even exacerbated when you have a limited fund because there's more potential for conflict to the interest.

MR. INSELBUCH: I beg your pardon, to the contrary. I think what the Supreme Court was saying in that language was no one says we have a limited fund here. When we have a limited fund, we must accept some limitation on all rights in order to accommodate all the claims against the fund. There was no such claim in *Amchem*.

JUDGE DAVIS: Would you address that language in the Court's opinion?

MR. INSELBUCH: Yes, Your Honor. It's page 117 Supreme Court at 2251, Your Honor. Thank you. The two sentences read, "The disparity between the currently injured and exposure only categories of plaintiffs and the diversity within each category are not made insignificant by the district court's findings that petitioners act as suffice to take claims under the settlement."

And then they say, "Although this is not a limited funds case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit the defendant's liability."

What I read that to mean and the only way I believe — and I submit you can read it logically — is in a limited fund case, there must be allocation decisions because there simply is not enough money to go around. So there must be essential allocation decisions designed to confine compensation in a limited funds case.

JUDGE SMITH: Which heightens the problem that you have between the competing interests.

MR. INSELBUCH: If the competing interests have a right to compete under Rule 23(b)(1)(B), Judge Smith, the quintessential example is the race to the courthouse. The point of Rule 23(b)(1)(B) is to stop the race to the courthouse to put everybody on an equal footing.

Under those circumstances, you certainly do not create a subclass and say, "Well, now we're going to have a race. We're going to have a debate between ones who could have gotten there sooner and the ones who could have gotten there later." Because as *Manville* teaches us, there is no right to more money based on your ability to get their sooner or get their later.

The difference in *Amchem* was that everybody would have gotten -- at least as far as anybody said in that case — everybody was entitled to all their money on whatever basis they were, and it was the settlement in *Amchem* that changed that rule. And it was the negotiation of that settlement, because it changed the way it would have worked in the tort system, that required subclass if you were going to make changes to the detriment of one group or another group.

What we have here is the fact situation itself changes the posture. It triggered the use of 23(b)(1)(B) which has an equitable object, the need to see to it that there's an equitable allocation, a fair allocation that doesn't take the tact forth the race to the courthouse.

Now, let's talk a little bit about the notice issue. *Amchem*, of course, was a (b)(3) class. A (c)(2) notice was given out. A (c)(2) notice must be designed and must successfully meet its task of preventing class members with a reasonable opportunity to elect to opt out. That's all of what the Supreme Court and the Third Circuit were talking about. They were talking about opt out rights.

As the Supreme Court said, even if they fully appreciate the significance of the class notice, those without current afflictions may not have the information or the foresight needed to decide intelligently whether to stay in or opt out.

That's because a (b)(3) class is a convenience class and because a (b)(3) class is there to provide people an opportunity if its more convenient for the class, more convenient for the courts, more convenient for the litigants to litigate their issues together, but at the same time to give those who do not so choose the opportunity to litigate their issues alone.

We have a (b)(1)(B) class. We could not resolve the insurance issues a hundred thousand different ways. We don't have the (b)(1)(B) issues back on remand, but clearly we don't have the ability to create an opt outs. Thus what is the purpose of a Rule 23(e) notice which is the notice we gave here.

It is to give sufficient notice, the best practicable notice under the circumstances, the Supreme Court has said, so that people can respond and come to the courthouse and provide input or objections or whatever. It certainly accomplished that purpose.

If you read the first page of the transcript of the first day of the fairness hearing, you'd find that the courthouse in Tyler, Texas, was overflooded with class members who came to that courthouse to the extent that Judge Parker had to assign another judge to take the overflow in another courtroom to give them an opportunity if they wanted to assert objections.

We had eminent counsel brought to this case, in fact, in the Supreme Court assisted by Professor Tribe from Harvard Law School. There was a fair opportunity, fair notice. The data in the record is extraordinary. 94.2 percent of all television households were reached with this notice on an average of five times. 1.4 million notice packages were delivered.

The notice was effective for its purpose. Its purpose was not to give each and every class member an opportunity to opt out, but to see to it that all of the issues properly raised by the settlement presented would have a fair airing. People would have enough information about it so that the courts could be edified.

A minute perhaps about the pre- and post-'59. I'm not sure I understand what anyone is saying the disadvantages were. I see statistics posted that settlement values for one group at one point in time were higher than the other group. Of course, you blink knowledge of the asbestos industry, you blink knowledge of the asbestos pathology if you think that that proves very much.

The people who are exposed later as of any point in time who had a shorter latency period, cancer, mesothelioma, has a very long latency period. So what you have in a time frame closer to 1959 is an opportunity for the less serious asbestosis cases to come to fruition and come to the courthouse, get litigated, and get settled, while you haven't seen what will come down to the pike, the cancer patients, the mesothelioma patients.

Those statistics certainly don't prove anything. But if we take the Supreme Court's teaching and we say to ourselves, okay, what do we have to see to determine whether there was a conflict under Rule (a)(4)? First we look to the presettlement litigation posture of the parties. What interests did they have in common or what interests did they not have in common? What was the conflict?

Surely the pre-'s and the post-'s had a common interest in a success in the litigation that involved coverage. Fibreboard had entered into a settlement with Pacific, one of its two insurers. Remember, there were two insurance policies that overlapped, each with unlimited coverage.

Fibreboard had settled out one of those policies under an agreement which provided a substantial amount of money for Fibreboard if Fibreboard ultimately prevailed against the others in the insurance coverage litigation. So the post-'59s and the pre-'59s shared the goal of winning the insurance litigation.

JUDGE SMITH: You're saying that there is no conflict between pre- and post-'59, even though they were dramatically different rates prior to this?

MR. INSELBUCH: I say that the settlement rates, the dollar amounts of settlement, points to no evidence of any conflict between them because you have to go back and find out what those dollar amounts mean. I think if you read the trial testimony, you will see that there was very good reasons why pathologically the cases that were come together queue, coming to the courthouse, were very different.

The pre-'59s, you have all the folks who were exposed to asbestos in the Second World War in the shipyards, in the Korean War. Those peoples, their diseases had matured. You have seen their mesothelioma cases, seen their lung cancer cases. You've seen their severe asbestosis cases.

The post-'59s in 1990, you hadn't had anywhere near the same latency period. Remember, post-'59s —

JUDGE SMITH: Well, you've just given us what the differences were. Why shouldn't they be represented by different class representatives?

MR. INSELBUCH: Because that's a distinction without a difference, because that only suggests that the people were going to be compensated in the same way depending on what their disease process was if and when their cases came to the court system. And there's nothing in either the interests of the parties prelitigation, the negotiating power of the people at the bargaining table, or in the settlement itself which puts those people into conflict.

Fibreboard has entered into an agreement with CNA under which CNA would use its best efforts if it was going to settle this case to settle all cases including pre- and post-'59 claims. Fibreboard had entered into an agreement with Pacific II, the Pacific II Agreement providing for substantial amounts of money to be paid to the post-'59s if there was a success in the litigation.

The interests were complement and in harmony throughout. And with all due respect, Judge Smith, it is a mistake to think that the facts of what the cases had been up to a point in time and the relative values of the

settlements would suggest that those relevant values were meaningful later on.

JUDGE SMITH: Well, we all know that in *Amchem* there was no counterpart to the pre- and post-'59. But there certainly was a counterpart here to the currently injured and the exposure only plaintiffs. And the Court spoke very forcefully to the conflict that exists between those two. The Court said that for the currently injured, that those were generously needing payment.

That tugs against the interest of the exposure only claims in ensuring an ample inflation protected funds for the future. You're well acquainted with that language. Are you telling us that the purpose of the current cases is not a conflict? We should simply read it out of existence?

MR. INSELBUCH: I'm saying that conflict did not exist in this case at all. In *Amchem* it did not exist until they entered into a settlement agreement. Because in the settlement agreement in *Amchem*, they provided for those distinctions, and that's what the Supreme Court and the Third Circuit found to require a subclassing.

I come back to what I said before. Where you have a limited fund and no one has any right to a preference over anyone else, there is no conflict between the people because the rule of law is that they should all be treated the same. And they should all be equitably allocated a share of the grease without respect to whether or not they could win the race to the courthouse or else there would be no equitable rule.

JUDGE SMITH: So there cannot be a conflict in a limited funds case is what you're telling us?

MR. INSELBUCH: I'm not saying that. There can be other conflicts in a limited funds case, but not conflict simply because one litigant perhaps in State A where they have a one-year trial docket and can get a judgment quicker than a litigant in State B where perhaps they have a five-year trial docket. That's not the race that is entitled and powered to claim that they have —

JUDGE SMITH: I'm just curious. Give us an example of what kind of conflict you think there might ever be in a limited funds case, assuming this is a limited funds case.

MR. INSELBUCH: I can't think of one offhand. But it can't depend upon why they are there in a limited fund context. It has to have to do with something else. *Manville* would give you the example. *Manville*, the Second Circuit's first opinion, they said if there's an enforceable right. There was *Manville* trust document.

JUDGE SMITH: Let me ask you another question while you have time. Is there anything left in this circuit of the *Corrugated Container* case insofar as it's relevant to the case that we're discussing today?

MR. INSELBUCH: Yes. I think the Supreme Court was saying that settlement funds are okay, settlement only classes are okay; however, they don't trump the (a)(2), (a)(3), and (a)(4) requirements of the Rule. They must be looked at in the absence of the settlement, but that look-see is illuminated by the settlement as well. I see my time is up.

JUDGE DAVIS: Thank you. Mr. Wachtell.

MR. WACHTELL: If it please the Court, this court originally held that this case was plainly different and distinguishable from *Amchem*. The question now before this court is is there anything in *Amchem* that says you've got it wrong. And I respectfully submit that the answer is no.

Indeed, and Mr. Baughman said that if you look at the language in *Amchem*, the language is there for a purpose. Yes, we should look at the language in *Amchem*. Over and over, the Supreme Court went out of its way to emphasize that this case, which I was well aware of, was different from *Amchem*. You find that repeatedly in the Supreme Court opinion itself.

JUDGE SMITH: Then I really wonder why the Supreme Court didn't just put us to all this trouble of vacating all the work that was done with the panel opinion and sending it back. And it seems to me if it's irrelevant,

they wouldn't have done that. They were certainly well aware of this case because they referred to it so many times I've lost count.

MR. WACHTELL: Your Honor, there is a wealth of precedent in the fact that a GVR from the Supreme Court is not a direction to the Court of Appeals to reverse itself.

JUDGE SMITH: But the Supreme Court has told us over the last two years what a GVR means is that there is a substantial likelihood that we on remand will find that this court previously was in error.

MR. WACHTELL: Your Honor, I've taken a look at the circuit since the Supreme Court decision. The Second, Fourth, Seventh, Ninth, and this court have each on remand stuck by previous decisions. And I think Justice Scalia's remand decision is not a decision to remand. There's been no departure from previous practice that the Supreme Court GVR is not a dictate to the Court of Appeals to reverse itself.

Your Honor, that is the prior practice. And, indeed, the Fifth Circuit, Judge Reavley was on the panel that stuck by its guns on the previous one. And at least one of these cases, obviously it's a fairly recent history, the *Anheuser-Busch* case, the Supreme Court subsequently denied certiorari.

Justice Scalia, of course, very specifically set forth on these cases to which Your Honor refers that this is no fault remand. Indeed he was finding fault jurisdictionally. What the Supreme Court was doing because there was no fault remand is to say it was not a determination of error. It is not a signal of error. And I think the Courts of Appeals —

JUDGE SMITH: He was dissenting. He was not speaking for the Court, was he?

MR. WACHTELL: He was not speaking to the Court, but there was no change of practice. And the Courts of Appeals, both before and after that case, have continued when they believe that a Supreme Court case does not impact their prior decision, to stand by it.

JUDGE SMITH: Well, sir, just tell us, what's the bottom line? Why do you suppose this case was sent back?

MR. WACHTELL: This case was sent back because the Supreme Court has a limited docket and does not wish to occupy spaces on certiorari case on cases which they have not had the benefit of the Court of Appeals determination itself of the issues. They have recognized that Courts of Appeals are themselves independent judges appointed in the same way, ratified in the same way, and that they should have first crack at deciding the issues.

This is not a mandate to reverse. And there's never been construed as such either before or since the matter in this case, Your Honor, I respectfully submit. And I would note that what the Supreme Court did not say here, there's not a word in the Supreme Court opinion which questions this court's determination of the proper (b)(1) limited funds case.

And then the Supreme Court went ahead to say over and over (b)(3) is the most adventuresome invasion. (b)(1)(B) and (b)(2) clearly calls for class certification, not clearly called for in the (b)(3) case.

JUDGE SMITH: Well, sir, we need to talk about, then, whether this is a limited funds, as we determined earlier. And we had indicated that we would be entertaining some discussion on the question of whether the purchase by Owens-Corning has any effect on the limited funds aspects of this case.

MR. WACHTELL: It does not, Your Honor. Fibreboard continues to be a separate subsidiary. It was not merged into Owens-Corning.

JUDGE SMITH: Well, for one thing, the district court considered in this case, and we did, the assets were considered to be approximately 250 million, as I recall.

MR. WACHTELL: Yes, sir.

JUDGE SMITH: And yet the sale was 500 million, I believe. Am I correct?

MR. WACHTELL: I frankly do not have the number in mind. But corporate finances and what acquirers are

prepared to pay for a company because of business advantages it may give does not mean that there are assets there for the claimants.

JUDGE SMITH: But it certainly means that the amount of money that the district court was looking at was substantially greater than what that court thought.

MR. WACHTELL: No, I do not think that subsequent events years after the fact retroactively mean that the facts that existed before the Supreme Court were wrong, by any stretch of the imagination.

JUDGE SMITH: Well, it certainly might call for a redetermination or a remand to the district court. But let me ask you one other thing in this regard. I understand that last Friday, Owens-Corning and Fibreboard jointly filed suit against the tobacco companies citing as one of their reasons the fact that they were going to be paying compensation under the settlement that we're involved with here today and that they are suing for billions more from the tobacco companies in order to, I guess, enrich the amount of money that's available.

It seems to me that that completely blows out of the water the prior analysis by the district court as to whether this is a limited fund, because such tobacco suits could indeed bring billions of dollars more into this case which would remove any need to even talk about limited funds.

MR. WACHTELL: Your Honor, with respect — and may I also say I represent the tobacco companies who will be on the receiving end of that; so perhaps I speak with bias. But with respect, I do not believe they do have a continuing reexamination of findings on subsequent events of class certification.

And the fact that somebody chooses to file a complaint, which I may say has not been adjudicated and I for one do not think there's any validity, I do not believe that it's a cause for reexamining determinations that were made years ago by the district court.

JUDGE SMITH: According to the news report, the public statement that was made again by Owens-

Corning and Fibreboard, as I understand you're speaking on behalf of today in oral argument — you were said to be representing them.

MR. WACHTELL: I don't represent Fibreboard. I represent the insurance company.

JUDGE SMITH: But you're here. No one's here on behalf of Fibreboard, and I'm asking you about this because it affects the limited funds aspect. Apparently, what Fibreboard and Owens-Corning publicly said was lawsuit was filed in part because the independent trustees of the Fibreboard settlement trust have urged the company to take steps to protect any trust rights or claims that might be lost or limited by currently proposed tobacco settlement, referring specifically to trust funds in this case.

MR. WACHTELL: Yes, sir. I don't think that affects the limited funds that were determined so many years ago whatsoever, the fact that people bring a lawsuit to protect conceivable rights. That I may just as well point, Your Honor, the tobacco industry said there's been agreement to cut off any such claims assuming that Congress ratifies it, and that we can debate what may or may not happen in lawsuits or in Congress.

You have a lawsuit. People claim rights. You have settlement. Congress will cut off rights. And you're right back where you were three years ago, Your Honor. I don't think you can determine this on people's claims or news reports of claims that people are making with respect to that.

Let me very briefly turn to the issue of commonality and typicality. I was quoted as saying that the class could not have brought a lawsuit here. I don't believe that's accurate. In fact, I'm looking at the transcript of the *Rudd* arguments. This is the next day on *Rudd*.

Quote, I think it would be reasonably clear and quite clear that the members of the class would be able to maintain their own declaratory judgment action and would have standing to do so against the insurance companies. What I may well have said in *Ahearn* is that

I do not think that members of the class would have brought individual damage actions by way of class and litigated them.

And that is indeed our position, that you could not have litigated individual damage claims. But as this court determined and as the district court determined, the settlement does not litigate individual damage claims and why the settlement cannot supply the requisites of commonality and typicality. And that is the teaching of the Supreme Court in *Amchem*.

The settlement can remove issues, for example, the individual adjudication of damages that would exist in a litigation context but do not exist in the settlement context by virtue of the settlement.

And that is precisely what this court quite accurately pointed out in its prior opinion, that this settlement was not litigating the individual claims, that it was providing for a fund where everybody had a common interest and a typical interest and for an equitable determination.

JUDGE SMITH: The Supreme Court said that there are times when post-settlement classes sometimes warrant more, not less, caution on the question of certification.

MR. WACHTELL: I think the entire thrust of the Supreme Court opinion is that the close scrutiny — and they say this over and over — is reserved for (b)(3) cases which are the ones where you're reaching where you have simple convenience and you do not have a need. And I think that is the teaching of *Amchem*.

JUDGE SMITH: Certainly the adequacy of representation issues cut across all class actions.

MR. WACHTELL: They do, Your Honor, but they are different, as Mr. Inselbuch pointed out. But let me say just a comment with regard to the pre-'59s and the post-'59s. If it really is a disabling conflict between representing pre-'59s and post-'59s because they have different interests and one theoretically was favored or not, how can Mr. Connor be here in this courtroom representing both of them?

He said there are 70 percent in one cast and 30 percent in the other. If that's really a disabling conflict, it's a disabling conflict of counsel.

JUDGE SMITH: You just told us that you're here on behalf of the insurance people and can't speak on behalf of Fibreboard and what they said in the public press release. I don't see any difference.

MR. WACHTELL: With respect, Your Honor, I do. I represent the insurance companies here and only the insurance companies. Mr. Connor has said there's a disabling conflict between pre-'s and post-'s; yet he says that he's representing both of them. Now, if half of them are prejudiced by this suit, how can he be challenging the result here?

Your Honor, I do not think that there is an adequacy of representation issue here. If I may have another 30 seconds. You have very specific findings of fact by the district court here on the specific facts of this case that there were no conflicts, that there were no disabling conflicts. The district court relied on the expert testimony before it. This court found that —

JUDGE SMITH: That was true in *Amchem*. In *Amchem*, I believe, it was the same expert who testified and the Supreme Court made no mention of it but, in fact, decided the adequacy of representation issues as a matter of law, not only of fact.

MR. WACHTELL: You have the same expert, and there were very, very different facts. Here you have this court who has expressed and ruled that the district court did not abuse its discretion by making these findings of fact. You had no such determination by the Third Circuit which I believe in no way ratifies the district court's determinations there.

Here you have very specific findings of fact on the facts of this case with respect to both pre- and post-'59 claims and the near and far future claims. Let me say on this near and far future claim.

JUDGE SMITH: Let me just ask you one other question. I referred the prior counsel to the question of whether

Corrugated is still good law. And I realize you don't always litigate in this circuit, but it's certainly important to us as far as continuing the litany the *Corrugated* case has.

In your original brief in this court you made the following statement. I'm just going to read. I'm not going take a lot of time on this. You said, "Moreover, the *in re Corrugated Containers* decision directly holding the court's fairness review provide sufficient protection for Class (b) members in the face of the alleged conflict of interest." Is that statement still valid in the wake of *Amchem*, in your view?

MR. WACHTELL: I think that on the question of fairness, it may well be. You have nothing in the Supreme Court opinion. The Supreme Court is talking about typicality, commonality, adequacy of representation. That may still be good law, but in any event it is not necessary to the conclusion here because neither the district court in this case nor this court did not remotely rely upon the fact that the fairness of the settlement was sufficient for adequacy.

You had very specific findings here quite-apart from the fairness of settlement. This case was never defended in the district court on the basis of a fair settlement. Okay, you've got a fair settlement, adequacy, commonality, typicality issues. To the contrary.

The Third Circuit and the district court where the four bases was, found that the elements were supplied and satisfied by the settlement.

JUDGE SMITH: You've answered my question. I was just asking you about *Corrugated Containers*, and you said they relied on it so —

MR. WACHTELL: If I may —

JUDGE DAVIS: You're out of time.

MR. WACHTELL: Thank you very much.

JUDGE DAVIS: Mr. Baughman.

MR. BAUGHMAN: With respect to adequacy of representation, Your Honor, I appreciate Mr. Inselbuch's candor with the court. He said if there's an enforceable

right that exists on behalf of certain class members, then that class would be cut off and notified by the class action. Then there would be a conflict between class members that required separate representation for the two groups.

That is exactly what the conflict between those who are currently injured and those who have not yet suffered an injury is. That's what the *Amchem* court held. There is no difference between the facts in *Amchem* and the facts in *Ahearn* with respect to that conflict, except for the fact that there is an allegation here that there are limited assets available, which as *Amchem*'s circuit court pointed out, it actually exacerbates that conflict.

Mr. Inselbuch says that there is no enforceable right to race to the courthouse, but he cannot deny that the common law rights of Mr. Ortiz and others who are currently injured, absent this injunction, absent this class certification, are to go to the courthouse, get a judgment, and enforce it. Gerald Ahearn can do absolutely nothing about that.

It's a substantive common law state right that is being cut off by this proceeding which raises the Rules Enabling Act problem. If this were truly a limited funds case, if there really was an res over which the district court exercised jurisdiction, then there wouldn't be a substantive enlargement or modification of rights going on because the rights of each class member against the rate are limited by the res itself and by the competing claims of other people. But this isn't such a case, an *in personam* damages case.

And Mr. Wachtell is also candid with the court. He said with respect to commonality and typicality issues here, that we would not be able to maintain individual damages claims as a class action. Your Honor, they keep over and over throughout this litigation acting as if it is an insurance coverage case and that's all it's about.

If that were all this was about, I would not be here except perhaps to cheer them on with respect to Fibreboard's securing insurance coverage.

JUDGE SMITH: Don't you think that's just an effort to divert attention from the issue of conflict within the class?

MR. BAUGHMAN: It's an effort to divert attention from the issue of conflict within the class and the fact that the certification in this case had as its primary purpose an adjustment of substantive rights which violate the Rules Enabling Act. This case modifies the substantive rights of Gerald Ahearn. It modifies the substantive rights of my clients, vis-à-vis one another, that violates the Rules Enabling Act.

And it points up the conflict between the group that currently could go out, absent this case, and get a judgment and those that couldn't because they're not sick yet.

Mr. Wachtell also said that the settlement can't supply commonality and typicality, and then he said something that I don't understand about the settlement here is supplying the commonality and typicality. It's removing it. That's just a bunch of mumbo jumbo, Your Honor.

The settlement here, just as the settlement in *Amchem*, does not liquidate any individual class members' claims. But what it does do is impose substantive limitations on those class members' claims through an equitable distribution process that's different from what their substantive rights as provided under the common law of the 50 states and other jurisdictions in the commonality principal — Puerto Rico.

And that is an adjustment that this court cannot allow under the Rules Enabling Act, it cannot allow under the Rule 23, and it cannot allow under — there is no commonality and typicality with respect to the individual damages claims themselves as opposed to the interests in the insurance coverage litigation which is not the subject of this case.

Now, seven years ago, Judge Higginbotham writing to this court *in re Fibreboard* said the asbestos case is quite powerfully for invasion and judicial creativity. The arguments favoring such invasion are compelling. But

they are better addressed to the representative branches of Congress and the state legislature. The judicial branch can offer the trial lawsuits. It has no power or competence to do more.

That statement by Judge Higginbotham has been echoed by Justice Ginsburg and five other members of the United States Supreme Court who said that the argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure feel and efficient means of compensating victims of asbestos exposure.

Congress, however, has not adopted such a solution. And Rule 23 must be interpreted with fidelity to the Rules Enabling Act and apply the interests of equity factor which in close view cannot fare without large load. So for all these reasons, this court must reverse and remand with direction to the district court to decertify the class.

JUDGE DAVIS: That's the end of arguments, and this court will recess until the first Monday of December.

(Whereupon the proceedings
were concluded at this time.)

(Certificate of Reporter omitted)

ORDER

(CITE AS: 117 S.Ct. 2503)

138 L.Ed.2d 1008, 65 USLW 3611,
65 USLW 3851, 65 USLW 3860

(United States Supreme Court)

(Dated June 27, 1997)

(James FLANAGAN and David H. Middleton, Petitioners, v. Gerald AHEARN, et al. — No. 96-1379; Case below, 90 F.3d 963; 101 F.3d 368)

On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Amchem Products, Inc.* v. *Windsor*, 521 U.S. ___, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).